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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 350

UNITED STATES OF AMERICA, *Petitioner*

v.

JOHN DONALD WALKER

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit reversing respondent's conviction on two counts of an indictment charging him with transporting in interstate commerce money taken by fraud and with intent to steal, in violation of the National Stolen Property Act.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 463-471) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered July 25, 1949 (R. 472). On August 18, 1949, the Government's time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Black to and including September 23, 1949 (R. 474). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether, on petitioner's trial for transporting in interstate commerce money taken by fraud from a woman with whom he had contracted a bigamous marriage as a means of perpetrating the fraud, his legal wife, whom he had previously inveigled into marriage by similar fraudulent blandishments and who had instituted divorce proceedings against him, was competent to testify as to a similar fraud he had perpetrated against her.

STATUTE AND RULE INVOLVED

The National Stolen Property Act of May 22, 1934, c. 333, § 3, 48 Stat. 794, as amended by the Act of August 3, 1939, 53 Stat. 1178, 18 U. S. C. (1946 ed.) 415, now 18 U. S. C. (1948 rev.) 2314, provided:

> Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted, or

> taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, * * * shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both * * *.

Rule 26 of the Federal Rules of Criminal Procedure provides:

> * * * The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

STATEMENT

Respondent, who in all three of his romantic, confidence ventures posed as a race horse owner and wealthy man, but whose alleged funds were always "tied up," first married Clara Duerr Walker on June 8, 1945, after meeting her on a train (R. 319). Before the marriage he succeeded in getting between $15,000 and $20,000 of her money (R. 322), ostensibly to purchase race horses. After this money was exhausted in 1946 he sent her to Fairbanks, Alaska (R. 324), where he was supposed to join her. The last time she heard from him was in a letter of March 24, 1947 (R. 324), in which he professed his love and his desire to be with her (R. 451-453).

Meanwhile, in mid-November 1946, respondent had met another wealthy woman, Mrs. Ashe, also on a train (R. 17, 18). On December 27, 1946 (R. 264), he entered into a bigamous marriage with a Mrs. Grehan, whom he had met in an eating place in Lexington, Kentucky (R. 247), and from whom he got over $23,000 from April 1946 to January 2, 1947, when he left her (R. 253, 254).

Then on January 25, 1947, he contracted another bigamous marriage with Mrs. Ashe, the victim in the instant case (R. 15, 21), after representing himself to her as a wealthy race horse owner with extensive property holdings (R. 16, 17). Because, as he said, he needed money for a trust estate for his son, she mortgaged a warehouse in San Antonio, Texas (R. 26), and received a cashier's check for $27,242.15, dated February 14, 1947 (R. 150, 446), which she turned over to him. He converted most of this check into Travellers checks and checks payable to the Railway Express Agency (R. 169) and converted one of the latter checks for $10,000 into one hundred $100 Travellers checks (R. 182). The checks were carried in their luggage when respondent and Mrs. Ashe made a trip from Houston, Texas, to New York City in February 1947 (R. 34-35, 209). The first count of the indictment was based upon these transactions (R. 5).

Later, about the middle of May 1947, while they were in Baltimore, respondent told Mrs. Ashe his lawyer had settled his income tax improperly and

that unless he could get some more money it might mean the penitentiary (R. 55). Reluctantly responding to his importunity, she sold the warehouse for $27,360.75, the cashier's check being dated May 28, 1947 (R. 57, 446). Again respondent converted most of the proceeds of this check into Railway Express and Travellers checks (R. 171) and converted one $15,000 check into one hundred and fifty $100 Travellers checks (R. 187). Again they took the checks with them in their luggage on a trip to New York in May 1947 (R. 209-210). These transactions formed the basis of count two (R. 5-6).

Respondent was found guilty on both counts (R. 7), and he was sentenced to 10 years' imprisonment on each, to run concurrently (R. 440).

The Court of Appeals, one judge dissenting, reversed the conviction on the sole ground that it was error to allow respondent's wife, Mrs. Clara Duerr Walker, to testify against him (R. 463-471). The facts as to this aspect of the case are set forth at p. 6, *infra*.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that no part of the testimony of respondent's wife was admissible.

2. In holding that the testimony of respondent's wife was not admissible under the exception of "necessity", whereby the law recognizes the com-

petency of a wife to testify as to her husband's crimes against herself.

3. In reversing respondent's conviction.

REASONS FOR GRANTING THE WRIT

Stated briefly, Mrs. Walker's testimony was to the effect that she married respondent on June 8, 1945 (R. 319); that before the marriage he received between $15,000 and $20,000 of her money, most of which came from the sale of her property and presumably was used in buying and selling race horses (R. 321-323); that she went to races with him a number of times; that he said he owned horses and she believed him (R. 330-331); that she and respondent decided to go to Alaska for a new start after her money was exhausted because the horses "were not doing so well" (R. 323); that after she arrived in Fairbanks, Alaska, in September 1946, he wired her $100 several times but did not join her there as he had promised (R. 324); that he did not pay back any of the money she had given him (R. 325); that the last time she heard from him was in a letter dated March 24, 1947, sent from Cincinnati, Ohio (R. 453), in which he stated he wanted to atone for his "miserable mistake" in sending her to Alaska, that he loved her, and wanted her with him (R. 324, 451-452); that eventually she doubted everything he said (R. 333) and began divorce proceedings against him in Alaska in October 1948 (R. 325).

The majority decision below that none of Mrs. Walker's testimony was admissible (R. 468) is based squarely upon the rule of the common law which rendered a wife incompetent to testify against her husband. Although the majority adverted to the privilege against the admission of confidential communications between spouses and said that the letter of March 24, 1947, was indeed confidential, the question for them was whether the rule of incompetency "has been changed; and, if not, whether the case at bar is within any exception" (R. 467). They concluded that the rule has not been changed; that "we should await the choice of Congress between the conflicting interests involved, or such an overwhelming general acceptance by the states of abolition of the privilege, as induced the Supreme Court to action in *Funk* v. *United States, supra* [290 U. S. 371]" (R. 468-469). The majority also concluded that the situation here was not within the so-called exception of necessity (R. 469):

> We do not forget that a wife from the earliest times was competent to testify against her husband, when the crime was an offence against her person; and we have ourselves extended the exception to the crime of transporting her as a prostitute in interstate commerce [*United States* v. *Mitchell,* 137 F. 2d 1006, affirmed on petition for rehearing, 138 F. 2d 831, certiorari denied, 321 U. S. 794], as has the Tenth Circuit [*Hayes* v. *United States,*

> 168 F. 2d 996]. The same exception probably extends to the privilege against the admission of confidential communications [Wigmore, § 2338]. The case at bar is not, however, within this exception, for Clara Duerr Walker was not the victim of the frauds for which the defendant was being tried. The basis of the exception has always been its "necessity" [Wigmore, § 2239]; for it was argued that, when the wife was the victim, the prosecution must fail without her testimony. That is not true when her testimony is only corroboratory or confirmatory of an offence against another person, even though it was an offence of the same character as that from which she has herself suffered.

The dissenting judge, on the other hand, obedient to his conception of his duty under the principle of *Funk* v. *United States,* 290 U. S. 371, "now embodied as a mandate in F. R. Cr. P. 26 [*supra*, p. 3]" (R. 471), thought that the bar of incompetency should be removed and that, in any event, in the face of "modern realities" (*ibid.*), the case here should properly be considered as within the exception of necessity, notwithstanding that Mrs. Walker was not the victim of the offenses for which respondent was being tried (R. 470). In his view, the only "solid ground" for barring a wife from testifying against her husband—"the promotion of marital peace"—is not subserved by excluding her testimony in a case of this kind,

where "the reason for the exclusion is now gone entirely, put an end to by the husband's acts" (R. 470-471).

The questions thus presented are important ones in the administration of criminal justice in the federal courts which should be settled by this Court. Furthermore, the Tenth Circuit in *Yoder* v. *United States,* 80 F. 2d 665, 668-9, has expressed the view,[1]

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[1] In that case the witness had been divorced from the defendant and she was not the victim of the Mann Act violation charged against him. In holding that her testimony was admissible, the court rested its decision squarely "on the underlying question, whether a wife is incompetent as a witness when called by the prosecution" (p. 667).

See also United States Department of Labor, Women's Bureau Bulletin No. 157, U. S. Summary, January 1, 1938, *Legal Status of Women in the United States of America,* Sec. 13, *Competency of Spouses to Testify for or Against Each Other,* p. 49: "There is a growing tendency to regard husband and wife as individuals in order to obtain essential evidence in either civil or criminal cases. This is true particularly in actions between spouses, and in cases that involve failure in material duty, violation of marital rights, or prosecutions for criminal violence and abuse inflicted by one spouse on the other or on their minor children." As of the date of Summary Bulletin, it appeared (p. 48) that 15 states (Alabama, Delaware, District of Columbia, Florida, Illinois, Indiana, Louisiana, Maine, Maryland, New Hampshire, New York, South Carolina, Tennessee, Virginia, Wisconsin) permitted husband and wife to testify for or against each other generally subject only to restraint against disclosing privileged, that is confidential, communications, concerning which there were recognized exceptions and modifications regulated either by statute or court decisions.

contrary to that of the court below,[2] that the bar of incompetence should be completely removed. See to the same effect Wigmore, *Evidence* (3d ed.) 1940, Secs. 2227-2228. The court in the *Yoder* case noted that

> These statutes, and the decisions of many courts which might be cited, indicate a clear and decided trend toward removing the bar of incompetency from witnesses as such; that we are moving steadily in the direction of allowing the trier of the facts to hear all the evidence, the interest or relationship of the witness to the parties being given due consideration in weighing its value. The trend is in the right direction * * * * .

We are in accord with the views of the dissenting judge that "reason and experience" (see Rule 26, *supra,* p. 3) dictate here, as in the *Funk* case, a fresh appraisal of the rigid common law rule of exclusion followed by the majority below, and, at least, the enunciation of a modern interpretation of that rule which accords with the realities of the situation presented by this case. For, after all, the marriage involved here was only a sham, an integral part of respondent's perfidious scheme to defraud Clara Duerr, and, as was to be expected, it ended in the institution of divorce proceedings

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[2] The decision below is in accord with decisions of the Third Circuit in *Paul* v. *United States,* 79 F. 2d 561, and the Sixth Circuit in *Brunner* v. *United States,* 168 F. 2d 281.

when, finally, she became aware of his true intentions. We submit that there is no logic and no public policy—indeed no sense—to be served in clothing a "husband" in such a situation with immunity against the use of damaging, relevant testimony. And in this view it would seem to be immaterial that the wife is not herself the victim of the offense charged but is one of successive victims whose testimony, though perhaps not indispensable for conviction, may nevertheless, as the dissenting judge pointed out (R. 470), "be the very evidence to place the case beyond dispute."[3] The wife here was testifying as to misconduct against herself; the fact that such testimony was elicited, not in a prosecution charging the fraud against her, but in a case involving similar offenses against others certainly should not warrant a different rule of admissibility.

In construing the exception for testimony relating to misconduct against the wife, the federal courts have held that a wife is competent to testify against her husband in a prosecution for transporting her in interstate commerce for the purpose of prostitution[4] and in a prosecution for mailing

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[3] The majority held that but for the fact that Mrs. Walker was respondent's lawful wife, her testimony would have been admissible (R. 464-465).

[4] *United States* v. *Mitchell*, 137 F. 2d 1006, 1008-1009 (C. A. 2), affirmed, 138 F. 2d 831, certiorari denied, 321 U. S. 794; *Shores* v. *United States*, 174 F. 2d 838, 840-841 (C. A. 8); *Hayes* v. *United States*, 168 F. 2d 996, 997 (C. A. 10); *Levine*

her poisoned candy.[5] It has also been held in a suit by the Government for statutory penalties arising from the sale of non-quota cotton that no privilege attached to communications between spouses concerning the disposition and safe-keeping of funds derived from the sale.[6] Certainly, if the rule of incompetence still survives, common sense, as well as public policy, require that the exception should be broad enough to cover situations like that involved in the case at bar.

CONCLUSION

For the reasons stated, we respectfully submit that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

September, 1949.

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v. *United States,* 163 F. 2d 992 (C. A. 5); *United States* v. *Williams,* 55 F. Supp. 375, 380 (D. Minn.); *Wilhoit* v. *Hiatt,* 60 F. Supp. 664, 665 (M.D. Pa.).

[5] *Kerr* v. *United States,* 11 F. 2d 227, 228 (C. A. 9), certiorari denied, 271 U. S. 689.

[6] *Fraser* v. *United States,* 145 F. 2d 139, 143-144 (C. A. 6), certiorari denied, 324 U. S. 849.

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